Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

HURSHEL WILLIAMS,

Petitioner,

v.

LARRY RHOADES, Chief Probation Officer for Kern County, California, and MATT FONTAINE, a California Probation Officer,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. DID THE FEDERAL AND STATE COURTS REASONABLY APPLY THIS COURT'S DECISION IN *BATSON V. KENTUCKY* AND RELATED PRECEDENT WHEN THEY FAILED TO CREDIT THE TRIAL COURT'S FINDING THAT THE PROSECUTOR AT PETITIONER'S STATE CRIMINAL TRIAL HAD FOUNDED HIS CHALLENGE TO THE ONLY PROSPECTIVE AFRICAN-AMERICAN JUROR ON PROHIBITED RACIAL CONSIDERATIONS?

II. DID THE TRIAL COURT REASONABLY APPLY *BATSON* WHEN, IN ASSESSING THE PROSECUTOR'S PEREMPTORY CHALLENGE, THE COURT "SET ASIDE" THE PROSECUTOR'S INVALID REASON AND CONSIDERED ONLY THE REASONS THAT REMAINED?

III. DID THE TRIAL COURT REASONABLY APPROVE THE PROSECUTOR'S CHALLENGE UNDER *BATSON* WHEN IT FAILED TO REQUIRE THE PROSECUTOR TO DEMONSTRATE THAT HE WOULD HAVE ISSUED HIS PEREMPTORY CHALLENGE EVEN IN THE ABSENCE OF THE REASON THE TRIAL COURT HAD FOUND INVALID?

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The published opinion of the Ninth Circuit Court of Appeals affirming the judgment of the district court is reported at *Williams v. Rhoades*, 354 F.3d 1101 (9th Cir. 2004) and appears at Appendix 1-15.

The district court's order denying the petition for a writ of habeas corpus is unreported and appears at Appendix 16-40.

STATEMENT OF JURISDICTION

The Ninth Circuit Court of Appeal issued its opinion affirming the judgment of the district court on January 16, 2004. Petitioner subsequently requested and obtained an extension of time to file a petition for rehearing and/or petition for hearing en banc. The Ninth Circuit denied petitions for panel rehearing and for rehearing en banc in an order issued on April 7, 2004. (App. 42) Petitioner thereafter sought and received an extension of time, to and including August 5, 2004, to file the instant petition for a writ of certiorari.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an

> impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

INTRODUCTORY STATEMENT

Rule 10(c) of the Rules of the Supreme Court identifies the following as a compelling reason why this Court may choose to review a decision of a United States court of appeals on certiorari:

> When . . . a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

Ibid; *see also Sehlude v. Commissioner*, 372 U.S. 128, 130 (1968) (Certiorari granted where court of appeals has misapplied or misconstrued relevant Supreme Court precedent).

The Ninth Circuit Court of Appeal's decision in this matter plainly implicates the criteria set forth in Rule 10(c). Petitioner Williams seeks an order granting certiorari on the ground that the Ninth Circuit's decision contravenes Supreme Court precedent, including *Batson v. Kentucky*, 476 U.S. 79 (1986), *Hernandez v. New York*, 500 U.S. 352, 360 (1991), and *Purkett v. Elem*, 514 U.S. 765 (1995), governing the three step inquiry into an allegation

that a prosecutor has violated a defendant's rights under the Equal Protection Clause by founding a peremptory challenge to a potential member of a petit jury on prohibited racial considerations.

The decisions below also implicate issues with profound legal and public policy implications. To the extent existing Supreme Court precedent does not resolve these issues, the case thus raises "important question[s] of federal law" that "should be . . . settled" by this Court within the meaning of Rule 10(c)'s opening clause.

Specifically, the state court prosecutor proffered a number of reasons to justify his peremptory challenge to the sole potential African-American juror at petitioner's state criminal trial. The trial judge found one of those reasons to be motivated by prohibited considerations of race, but affirmed the challenge on the basis of the remaining reasons, considered *apart* from the one that he had found invalid.

Petitioner has steadfastly contended that in affirming the trial court's decision, the state appellate court unreasonably applied *Batson* when it refused to credit the trial court's finding of an invalid reason, and that both the trial court and state appellate court unreasonably applied *Batson* in "setting aside" the prohibited reason in assessing the prosecutor's ultimate intent.

In affirming the district court's denial of habeas relief, the Ninth Circuit panel's opinion likewise refused to credit the trial court's finding that one of the prosecutor's explanations evinced a discriminatory intent. The panel so ruled in the belief that the disputed explanation raised an issue only as to step *two* of the *Batson* inquiry – i.e., whether, as a matter of law, the explanation appeared

discriminatory on its face. The trial court's construction of the disputed explanation warranted deference, however, whether or not it appeared race-neutral on its face because that construction rested on a fact-bound assessment of the prosecutor's demeanor and credibility, an inquiry mandated at step *three* of the *Batson* inquiry.

The Ninth Circuit's present opinion thus substitutes a step two analysis, which, as discussed in *Purkett*, *supra*, addresses only the facial validity of the prosecutor's explanation, *in place of* the credibility assessment required at step three of the *Batson* test. Such a rule cannot be squared with this Court's governing precedent and will surely trigger confusion among the state and federal courts in applying *Batson*'s requirements.

Furthermore, the Circuit Court's failure to credit the state trial court's finding that one of the prosecutor's explanations was invalid undermined its analysis of the trial court's ultimate ruling insofar as the latter approved the peremptory challenge on the basis of the remaining justifications proffered by the prosecutor. If the state trial court legitimately found that a key justification for the challenge evinced discriminatory intent – and it clearly did so – then this Court's Equal Protection precedent required that court to weigh that invalid reason against all others rather than "setting it aside" in settling the issue of intent.

Finally, this Court's precedent further required the prosecutor to demonstrate he would have asserted his challenge to the juror even in absence of his racially prohibited motivation. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 270, n. 21 (1977) No such showing was ever made.

In view of the Ninth Circuit's patent misapplication of the *Batson* inquiry, the state trial court's failure to fairly weigh all of the prosecutor's justifications, and the prosecutor's failure to make the showing required by *Arlington*, this Court should grant the instant petition and order full briefing on the merits in this case.

STATEMENT OF THE CASE

On February 16, 1996, the state of California filed a four-count information charging petitioner with conspiracy to appropriate public monies, conspiracy to defraud the Lost Hills Water District, misappropriation of public funds, and grand theft. (CT 59-66)[1] A jury trial began on May 7, 1996. The trial court later dismissed the misappropriation count. (CT 319) Deliberations on the remaining counts began on May 15, 1996. (CT 325) On May 16, 1996, counsel stipulated that the jury was "hopelessly deadlocked," and the Court declared a mistrial. (CT 474)

A second jury trial on the two conspiracy counts and the grand theft count began on July 15, 1996 (CT 599-602). On Friday, July 19, 1996, the jury found petitioner guilty on all counts. (CT 748-749). The trial court thereafter sentenced petitioner to two years in prison and to pay the state restitution of more than $60,000. (CT 827-28)

[1] "CT" refers to the Clerk's Transcript in the state court appeal; "RT" to the Reporter's Transcript in that appeal; "AOB" to appellant's opening brief in the Ninth Circuit appeal; "Reply" to appellant's reply brief in the Ninth Circuit appeal; and "ER" to the Excerpts of Record in the Ninth Circuit appeal.

The Court of Appeal for the Fifth Appellate District affirmed petitioner's convictions in an unpublished opinion issued on August 4, 1999. (App. 43-55 [excerpt]) Petitioner filed a petition for review in the California Supreme Court. Justice Mosk was of the opinion that the petition should be granted, but the remaining members of the Court disagreed, and the petition was denied.

On February 6, 2001, petitioner filed a petition for a writ of habeas corpus in the federal District Court for the Eastern District of California. A magistrate required a response from respondent, but after completion of briefing denied the petition in an opinion which largely duplicated the analysis employed by the state appellate court. (App. 16-40)

Petitioner filed a timely notice of appeal from the district court's judgment. (Dkt. 23) Though the magistrate thereafter denied a certificate of appealability as to all of petitioner's claims (Dkt. 25), the Ninth Circuit, on petitioner's motion, granted a certificate as to the issue "whether the district court erred by determining that the state court's denial of petitioner's *Batson-Wheeler* challenge was not an unreasonable application of established federal law." (ER 254)

On January 16, 2004, following the completion of the appellate briefing, a three judge merits panel of the Ninth Circuit issued a published opinion affirming the judgment of the district court. (App. 1-15) After seeking and receiving an extension of time, petitioner filed petition for rehearing by the three-judge panel and, alternatively, by the en banc Court. That petition was denied in a Ninth Circuit order issued on April 7, 2004. (App. 42) Upon petitioner's application, this Court thereafter extended the

time for filing the instant petition from the original due date of July 6, 2005, to and including August 5, 2004.

STATEMENT OF FACTS[2]

A. The *Batson* Inquiry

Defendant Williams is an African-American man. (ER 129). Prosecution witness Alice Stowe, who testified under a grant of immunity, and Dennis Stowe, Williams' alleged co-conspirator, are also black. (ER 130) There was one black ("juror X") among the potential jurors subjected to voir dire at petitioner's second trial. On the start of the second day of selection, the prosecutor belatedly removed juror X by means of a peremptory challenge. (ER 120)

Immediately after juror X's excusal, defense counsel Mitts asked to approach the bench and the trial judge held an unreported side conference with both counsel. (ER 120) The trial judge later reported that defense counsel had stated his intent to make a motion under *People v. Wheeler*, 22 Cal. 3d 258 (1978), and that a hearing would be conducted on the matter. (ER 128)[3] The judge recounted that at the earlier sidebar he had found that juror X was the only member of the jury panel who appeared to be an African-American or black. (RT 129) He stated that because petitioner Williams is also African-American or black, he was prepared to find a *prima facie* case under

[2] The state court of appeal's summary of the relevant facts is recited in the federal district court's order, at App. 19-32.

[3] In California, a *Wheeler* motion is the procedural equivalent of a federal *Batson* challenge. *McClain v. Prunty*, 217 F.3d 1209, 1216, n.2 (9th Cir. 2000)

Wheeler (i.e., a finding that the prosecutor had improperly excluded the juror for racial reasons.) (*Id.*) That being so, the judge said the prosecution would be required, if it could, to justify its exercise of the peremptory "which will take care of it procedurally." The judge then directed the prosecutor to "explain (his) reasons." (*Id.*)

Prosecutor Mitchell stated that after reflecting on the black juror during the previous night, he concluded that he had to make his challenge. (ER 129) Explaining his decision, he cited his purported observations that prosecution witness Alice Stowe is African-American and, like juror X, had a son about the age of Dennis Stowe (ER 129-31), and that juror X had not readily recalled the time or nature of the prior proceeding at which she had testified. (ER 131-32) Mitchell also stated that in declaring that she could discount prior news reports about the case, the black juror effectively indicated she was aware that Dennis Stowe and Donald Moore had been convicted. (*Id.*)[4]

Calling his last point "irrelevant," prosecutor Mitchell said he was mainly concerned with not getting honest, candid answers from her. (ER 132) He stated that he "(did) not think Alice Stowe's testimony will be [viewed] with an objective frame of mind," then added, " . . . but there's more, your Honor." (*Id.*)

B. The Invalid Explanation

Mitchell then stated this was his fourth Lost Hills Water District trial, and that he deliberately left a black

[4] Moore was another individual charged in another case with defrauding the District.

juror on the one involving Dennis Stowe. After describing that choice as the responsibility of the community and as means of giving more authority to the jury, Mitchell continued:

> Quite frankly, when there are all the different ethnic persuasions, here's what we find to be the truth: that the jury came back and convicted in the Donald Moore case. The chairman, chair foreman of that jury was, in fact, black. And in the last case I tried, the one that hung up, it was the case of People versus Hurshel Williams that hung up.
>
> One of the reasons it hung up, I had an African American juror who went back and nullified that jury because of race, solely because of race, and I had left that juror on, again, because I wanted to make a statement to the community that this was a fair and impartial jury.

(ER 133:8-19)[5] Mitchell said he learned from this that he had ignored significant factors in "that juror's" background, and that "one (factor) that I would have ignored was that juror was of any racial background." (ER 133:19-23)

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[5] As his comments in this connection suggest, Mr. Mitchell had been involved in three previous trials with African-American defendants related to the alleged Lost Hills Water District thefts. In the first two, those of Donald Moore and Dennis Stowe, juries with African-American members had returned convictions. (Exh. A to District Court Habeas Petition, at 13) The third trial involved petitioner Williams and presented qualitatively different facts. An African-American sat on this jury which, after days of deliberations, was unable to reach a verdict. (*Id.* at 2, 13)

Mitchell claimed that he struggled with the issue of jury nullification and wanted nothing more than to have more black jurors on juries. (ER 134) He stated that this was the only black juror he had excused since last April, but that in this case, having looked at the juror and considered her responses, he had no alternative but to make his challenge. He concluded by saying that his reasons were honest and sincere. (*Id.*) Defense counsel challenged the explanation, stating that Mitchell's comments clearly implied that the black juror was excused because of her race. (ER 135)

C. Trial Court Findings and Further Discussion of the Invalid Explanation

At this point the trial judge made his purported findings concerning the challenge. (ER 136-36) He generally stated his agreement with the non-race related observations cited by Mitchell. (ER 136) The judge further stated he accepted Mitchell's statement that in the first Lost Hills case Mitchell had a black juror and that that case resulted in a conviction. (ER 136) The judge also recalled that on the second Lost Hills case the foreperson was a black juror, and that case too had ended with a conviction. (*Id.*) The judge then stated:

> What, quite frankly, bored (sic) me was with regard to your comment that on this particular case, when this one was tried, that it was a black juror who caused a deadlocked verdict because of race or because of jury nullification. I'd be awfully curious as to how you came to that conclusion.

(ER 136:20-25)

In response, Mitchell stated that he had reached his conclusion by speaking to certain "angry" jurors after the initial mistrial. (ER 136) Mitchell said the jurors told him that at the outset of deliberations, the "individual" walked into the jury room and said he did not care what the facts were, and that he would vote not guilty. (ER 136-37) "And," said Mitchell, "it was because of race." (ER 137) The jurors purportedly said they tried a read-back of testimony to persuade the black juror only to see him pull out a paperback and refuse to participate. Mitchell said that given this incident, he had to reassess his views about jury selection. (*Id.*)

Mitchell then stated he "(had) his mind set" and had "bent over backwards." He said he (had) an African-American juror, "at least one person of the community that matches their ethnic persuasion on that case." He said that one could not be blind to the other things a juror is telling him. He announced that a potential juror should not be allowed to sit on the jury simply because that person has the same ethnic persuasion as the defendant. He remarked that "(t)here are people whose sole purpose is to get on a jury just solely so they can nullify the verdict." (ER 137)

The trial judge then stated that petitioner's *Wheeler* motion was denied. But he continued:

> I do not think, as I analyze it, that the one part of the rationale of the prosecutor is valid. I do not think that because I do not think it can fairly be said that Ms. (047953) came in here and wanted to serve someplace so that she could return a verdict in favor of Mr. Williams because she shared the same ethnic background or race. In fact, my rationale for that finding is that on the

> two previous cases where convictions were had, one, the foreperson was black and the other there was one black juror out of the 12.
>
> So with all due respect, *I do not believe it to be valid that one can say that in a case such as this, one will not keep a black person because that person is not going to follow the law.*

(ER 138) (Emphasis added)

The judge concluded that, "*having set that [invalid reason] aside*," he thought the other reasons advanced by Mr. Mitchell were legitimate. (ER 139) (Emphasis added)

D. The Decision of the State Court of Appeal

The state court of appeal sustained the trial court's ruling on petitioner's Batson challenge primarily on the grounds that 1) in finding part of the prosecutor's explanation invalid, the trial court had "missed the import" of the prosecutor's comments concerning the prior service of African-Americans on the jury, and 2) the trial court had conducted an adequate inquiry concerning the other, purportedly race-neutral reasons invoked in support of the peremptory challenge. (App. 43-55; ER 170-79)[6]

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[6] Pages 43-55 of the Appendix set forth the state appellate court's substantive discussion of petitioner's *Batson* claim. That court's statement of facts relating to the *Batson* claim is recited verbatim in the district court's order denying the petition for a writ of habeas corpus, at Appendix 19-32.

ARGUMENT

I. THE STATE AND FEDERAL COURTS UNREASONABLY APPLIED *BATSON* AND RELATED PRECEDENT WHEN THEY REFUSED TO DEFER TO THE TRIAL COURT'S FINDING THAT THE PROSECUTOR'S CHALLENGE TO THE SOLE AFRICAN-AMERICAN JUROR AT PETITIONER'S TRIAL WAS FOUNDED IN PART ON A PROHIBITED RACIAL INTENT, BECAUSE THAT FINDING ISSUED FROM A "STEP THREE" ASSESSMENT OF THE PROSECUTOR'S CREDIBILITY AND DEMEANOR

A. General Principles of Law

Under the AEDPA, a federal court may grant a writ of habeas corpus to a state prisoner only if the state court's decision is "contrary to, or involve[s] an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States", 28 U.S.C. § 2254(d)(1), or is "based on an unreasonable determination of the facts in light of the evidence presented" in the state courts, 28 U.S.C. § 2254(d)(2).

While section 2254 enacts a rule of deference with respect to state court interpretations and application of federal constitutional law, "[e]ven in the context of federal habeas, deference does not imply abandonment or abdication of judicial review. Deference does not by definition preclude relief." *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003); *see also Williams*, 529 U.S. at 379 ("A construction of AEDPA that would require the federal courts to cede th[eir] authority [to interpret federal law] to the courts of the States would be inconsistent with the practice that federal judges have traditionally followed in discharging their duties under Article III of the Constitution."); *id.* at

389 ("If, after carefully weighing all the reasons for accepting a state court's judgment, a federal court is convinced that a prisoner's custody . . . violates the Constitution, that independent judgment should prevail.")

B. The *Batson* Inquiry

"The Equal Protection Clause guarantees the defendant that the State will not exclude members of his race from the jury venire on account of race." *Batson v. Kentucky*, 476 U.S. 79, 86 (1986). "[T]he State's privilege to strike individual jurors through peremptory challenges . . . is subject to the commands of the Equal Protection Clause." *Id.* at 89. Analysis of a *Batson* claim involves a three-step process. The defendant must first make a prima facie showing that the prosecution exercised its peremptory challenges based on race. "Once the defendant makes a prima facie showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors." *Id.* at 97. Finally, " . . . in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination." *Miller-El v. Cockrell*, 537 U.S. 322, 328-29 (2003) *supra*, citing *Batson*, 476 U.S. at 98.

C. The Ninth Circuit's Opinion Patently Disregards the Deference Owed the Trial Court's Credibility Findings at Step Three of the *Batson* Inquiry

In the present case, the trial court determined that petitioner had established a prima facie case of discrimination, thereby shifting the burden to the prosecution to articulate a race-neutral explanation for the exercise of

the peremptory challenge in question. *Batson*, 476 U.S. at 97. "A neutral explanation in the context of our analysis here means an explanation based on something other than the race of the juror." *Hernandez v. New York*, 500 U.S. 352, 360 (1991) "'At this step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race-neutral.'" *Id.*

In both the state appeal and federal habeas proceedings, petitioner contended that when the prosecutor described the purported conduct of an African-American juror in "hanging up" the initial trial and insisted that he nevertheless "bent over backwards" to seat minorities, his remarks – as the trial court found – evinced an inherent discriminatory intent rendering it unnecessary to proceed to the credibility determination required at step three. (*See, e.g.*, AOB at 23-26) The state appellate court rejected this claim, reasoning that viewed "in context," those comments reflected Mitchell's desire to seat African-Americans on his juries at all costs. (App. 46-47, 53-54; ER 172, 178)

In assessing petitioner's challenge to this aspect of the state appellate ruling, the Ninth Circuit preliminarily observed:

> The reasons [underlying a peremptory challenge] must be taken at face value at [step two] because *any determination about the credibility of the explanation is reserved for the third step, where the court ultimately determines whether discrimination occurred. Purkett v. Elem,* 514 U.S. 765, 767-68, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995). The facial validity of proffered reasons is an issue of

> law reviewed *de novo. Tolbert v. Page,* 182 F.3d 677, 680 n. 5 (9th Cir. 1999).

Exh. A, at 1107. (Emphasis added)

Applying these principles, the Ninth Circuit approved the analysis employed by the state court of appeal, concluding that, taken at face value, the prosecutor's remarks concerning his experience at the first trial and his general approach vis-a-vis seating minorities were but a " . . . a clumsy but benign attempt . . . to bolster his claim of race-neutrality by providing context to his proffered reasons." (*Id.*)

If this were petitioner's *only* challenge to the state appellate court's decision to override the trial court's finding that part of the prosecutor's explanation was invalid, the matter would end there. But petitioner had always contended that, whether or not the relevant remarks facially evinced a discriminatory intent – the subject of the *Batson* inquiry at step *two* – the trial court necessarily understood the remarks to express a discriminatory intent at step *three* of the *Batson* inquiry. *See Purkett, supra,* 514 U.S. at 767-68. Thus, in divining motive and intent, the trial court was informed not only by the surface import of the prosecutor's words, but also by his demeanor and credibility in delivering them.

Neither the state appellate court nor the federal courts were entitled to dismiss the trial court's findings to the extent they were founded on such matters. As the Court stated in *Batson*, "Since the trial judge's findings [as to whether a comment evinces purposeful discrimination] largely will turn on evaluation of credibility, *a reviewing court ordinarily should give those findings great deference.*" *Ibid.*, 476 U.S. at 1724, n. 21 (Emphasis added). In

Hernandez, supra, this Court elaborated on this point, observing:

> Deference to trial court findings on the issue of discriminatory intent makes particular sense in this context because, as we noted in *Batson*, the finding 'largely will turn on evaluation of credibility.' 476 U.S., at 98, n. 21, 106 S.Ct. 1712. . . . *As with the state of mind of a juror, evaluation of the prosecutor's state of mind based on demeanor and credibility lies 'peculiarly within a trial judge's province.' Wainwright v. Witt*, 469 U.S. 412, 428, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985), citing *Patton v. Yount*, 467 U.S. 1025, 1038, 104 S.Ct. 2885, 81 L.Ed.2d 847 (1984).

Ibid., 500 U.S., at 365 (Emphasis added).

Patton, in turn, held that "there are good reasons to apply the statutory presumption of correctness to the trial court's resolution of . . . questions [of juror partiality]." 467 U.S. at 1038. Among other things,

> [T]he [partiality] determination is essentially one of credibility, and therefore largely one of demeanor. *As we have said on numerous occasions, the trial court's resolution of such questions is entitled, even on direct appeal, to "special deference."* E.g., *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 500 [] (1984). The respect paid such findings in a habeas proceeding certainly should be no less. *See Marshall v. Lonberger*, 459 U.S. 422, 434-435 [], (1983).

Ibid. (Emphasis added) In this connection the Court then observed:

> *Demeanor plays a fundamental role not only in determining juror credibility, but also in simply understanding what a potential juror is saying.*
>
> . . . Demeanor, inflection, the flow of the questions and answers can make confused and conflicting utterances comprehensible.

Patton v. Yount, 467 U.S. at 1038, n. 14 (Emphasis added).

In light of this precedent, the state appellate court unreasonably applied *Batson* when it refused to defer to the trial court's construction of what the prosecutor was "really" saying in describing his prior experience with African-American jurors and his present expectations as to juror X. The trial court did not believe the prosecutor's account of developments at the first trial or his claim of completely benign intent; indeed, the skepticism with which the trial court viewed certain remarks is palpable.[7]

The Ninth Circuit's opinion is no less unreasonable. While the opinion acknowledges petitioner's claim that the state appellate court had usurped the trial court's fact-finding function in reinterpreting the prosecutor's comments, the opinion rejects it because "[t]he second *Batson* step answers a legal, not a factual question." App. 10. That may well be true, but, again, as petitioner has contended (AOB, at 29-33; Reply, at 15-18), the *third* step, i.e, the inquiry into the credibility of the prosecutor's explanations, *is* a factual question to which reviewing courts must

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[7] "What, quite frankly, bored (sic) me was with regard to your comment that on this particular case, when this one was tried, that it was a black juror who caused a deadlocked verdict because of race or because of jury nullification. I'd be awfully curious as to how you came to that conclusion." (RT 19:20-25)

defer. The Ninth Circuit plainly erred when it failed to do so.

D. The State Trial Court Misapplied *Batson* When It "Set Aside" the Prosecutor's Prohibited Justification In Evaluating His Intent

The Ninth Circuit's opinion is significant not only because of its status as precedent misconstruing the nature of task entailed at the third step of the *Batson* inquiry, but also because its reconstruction of the prosecutor's remarks invalidated its remaining analysis of the third-step "weighing" process. Specifically, having characterized the prosecutor's disputed remarks as benign, the Circuit Court was compelled to approve the trial court's ultimate finding that the prosecutor acted properly because, in the Circuit's view, all of the reasons he expressed were now viewed as race-neutral. (*Williams*, 354 F.3d at 1108-10; App. 11-15)

Had the Ninth Circuit deferred to the trial court's finding that a critical reason was illegitimate, however, it could not have approved the trial court's ultimate decision to sustain the peremptory challenge because, in its final assessment of the prosecutor's remarks, the trial court expressly "set aside" that illegitimate reason. (ER 139) This approach to assessing the prosecutor's reasons controverts the express requirements of *Batson*; at the final stage of the inquiry, the trial court is never permitted to "set aside" any proffered explanation, but must rather ensure that every explanation is included in the mix, so that the court can weigh all explanations together and thereby make an informed judgment as to the prosecutor's true motivation. *See Lewis v. Lewis*, 321 F.3d 824, 831 (9th

Cir. 2003) (After analyzing each of the prosecutor's proffered reasons, court should "step back and analyze *all of the reasons together*." [Emphasis added]); *McClain v. Prunty*, 217 F.3d 1209, 1223 (9th Cir. 2000) (" . . . the trial court abdicated its responsibility to make an ultimate determination on the issue of discriminatory intent *based on all the facts and circumstances.*") (Emphasis added)

The failure of the trial and reviewing courts to include the prosecutor's illegitimate reason in determining his intent likewise constitutes a gross misapplication of *Batson*'s requirements and warrants an order granting the instant petition.

E. The State Trial Court Misapplied *Batson* When It Failed to Require the Prosecutor to Demonstrate that He Would Have Challenged Juror X In the Absence of His Prohibited Race-Based Justification

Again, after hearing all of the prosecutor's professed reasons for his challenge in this case, the trial court permitted it to stand on the grounds that, notwithstanding the expression of a prohibited motive, the remaining reasons appeared legitimate. (RT 18-19, ER 135-36; RT 21-22, ER 138-39) Given the trial court's finding that one of the reasons was invalid, however, this Court's precedent required the court not only to weigh *all* of the prosecutor's justifications together (*see* subsection D, supra), but also to demand from the prosecutor a showing that he would have challenged juror X in the absence of the invalid justification. *See Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 270, n. 21 (1977) (If a discriminatory purpose is partial motivation of decision challenged on Equal Protection grounds, burden

shifts to the decision's defender to demonstrate that decision would have been made even in absence of such purpose); *Howard v. Senkowski*, 986 F.2d 24 (2nd Cir. 1993) (same). The trial court's failure to do so provides yet another reason for granting the writ.

CONCLUSION

For the reasons stated, the Court should grant the instant petition and order briefing and argument on the case in this Court.

Dated: August 5, 2004

Respectfully submitted,

DENNIS P. RIORDAN
Counsel of Record for Petitioner
Hurshel Williams

354 F.3d 1101

United States Court of Appeals,
Ninth Circuit.

Hurshel WILLIAMS, Petitioner-Appellant,
v.
Larry RHOADES; Matt Fontaine,
Respondents-Appellees.

No. 02-15280.

Argued and Submitted Nov. 6, 2003.
Filed Jan. 16, 2004.

Donald M. Horgan, Riordan & Horgan, San Francisco, CA, for the petitioner-appellant.

Brian Alvarez, Deputy Attorney General, California Attorney General, Fresno, CA, for the respondents-appellees.

Appeal from the United States District Court for the Eastern District of California; Hollis G. Best, Magistrate, Presiding. D.C. No. CV-01-05153-HGB.

Before FARRIS, TROTT, Circuit Judges, and WEINER,* Senior District Judge.

OPINION

FARRIS, Circuit Judge.

Hurshel Williams appeals the district court's ruling denying his petition for habeas corpus, claiming that race motivated the prosecutor's peremptory strike of the only

* Hon. Charles R. Weiner, Senior District Judge for the Eastern District of Pennsylvania, sitting by designation.

African American from his jury in violation of the Equal Protection principles articulated in *Batson v. Kentucky.* The record reflects that the state courts did not unreasonably apply clearly established law or unreasonably determine the facts in denying Williams' *Batson* challenge. We affirm.

Background

Williams was charged in California state court with conspiracy to defraud, misappropriation of public funds, and grand theft by false pretenses in connection with a scandal at the Lost Hills Water District. The State alleged that Williams, a supplier to the District, submitted false invoices with the aid of Dennis Stowe, a District employee. Stowe received kickbacks from Williams in the form of checks written to fictitious payees. Stowe or his mother, Alice Stowe, cashed the checks at the bank where she worked as a teller.

Williams' first trial ended when the jury was unable to reach a unanimous verdict. During *voir dire* before the second trial, the parties questioned "Juror X," a 60-year-old African American woman, about her knowledge of the case through press coverage, and her experience testifying in a prior murder trial.

When the prosecutor later used a peremptory challenge to strike Juror X, Williams objected, claiming the challenge was improperly race-based under *People v. Wheeler,* the California version of *Batson v. Kentucky.*[1] The

[1] *People v. Wheeler,* 22 Cal.3d 258, 148 Cal.Rptr. 890, 583 P.2d 748 (1978); *Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

trial court ruled that Williams made a *prima facie* showing of discrimination and required the prosecutor to give reasons for striking Juror X.

The prosecutor explained that Alice Stowe, who "happen[ed] to be African American," would testify about the kickback checks written to her son. He predicted that Alice Stowe would be a hostile witness since she originally had been charged in the conspiracy and was granted immunity so the prosecutor could compel her testimony. The prosecutor stated that "Alice Stowe is almost in virtually in the same situation as [Juror X]," noting that the two had sons of the same age. In light of the similarities, the prosecutor feared that Juror X might not view Stowe's testimony objectively.

The following comments form the centerpiece of Williams' *Batson* challenge:

> This is the fourth time now that I have tried personally one of these Lost Hills Water District cases. The one on Dennis Stowe lasted all summer, year ago to the day. I left – deliberately left a black juror on that case. I felt it was the responsibility, the consensus of the community in the form of the verdict. I think it gives more weight and more authority to the jury.
>
> Quite frankly, when there are all different ethnic persuasions, here's what we find to be the truth: That the jury came back and convicted in the Donald Moore case [*sic*]. The . . . foreman of that jury was, in fact, black. And in the last case that I tried, that one hung up, it was the case of People versus Hurshel Williams that hung up.
>
> One of the reasons it hung up, I had an African American juror who went back and nullified that jury because of race, solely because of race, and I had left

> that juror on, again, because I wanted to make a statement to the community that this was a fair and impartial jury. The lesson that I learned was that I had ignored some significant factors in that juror's background, one that I would have ignored was that juror was of any racial background [*sic*].
>
> Just as the Court will recognize yesterday, I have challenged three jurors, two of them were white, and the third juror of whom was black. Two of those jurors I specifically excused because I was concerned about jury nullification.
>
> . . .
>
> As to jury nullifications, your Honor, I struggle with this. In this country, we don't have a lot of black jurors to sit on juries. There's nothing I would want more of. I mean that truly. But in this specific case, with this specific juror – this is the only black juror that I have excused to my knowledge since I've been back in the district attorney's office last April – but this particular juror, having looked at her answers and watched the way she responded to me, I felt I had no other alternative but to represent my client and to exercise that peremptory challenge.

Williams argued these statements showed the prosecutor struck Juror X because she was African American, like the problem juror in the first trial. The trial court agreed that Juror X had acted differently toward the prosecutor, and found it curious that she could not remember her prior trial experience, given that it was a murder trial. The court then asked the prosecutor what had occurred in the first trial. The prosecutor explained that several angry jurors told him that the African American juror had refused to deliberate, stating he would never vote to convict. The prosecutor concluded:

> I have my mind set. I've bent over backwards. I have a defendant of African American persuasion, at least one person in the community that matches their ethnic persuasion on that case. That's the point I'm trying to make.
>
> But I think the lesson that I've learned is that you can't be blind to the other things that they're telling you . . . You can't assume that, well, okay, because they happen to be of the same ethnic persuasion of the defendant, I'm going to allow them to be on the jury. We can't be blind in our society. There are people whose sole purpose is to get on a jury just solely so they can nullify the verdict.
>
> . . .
>
> That's why I excused [another juror] yesterday, and that's why I excused [Juror X] today. And my initial reaction . . . if [Juror X] had not been black, I would have excused her as soon as she was done. I might have excused her as to cause because she testified in a murder case, couldn't remember, et cetera, et cetera. Because she was black, I bent over backwards to try to find a justification in my mind for keeping her, and I couldn't. That's why I excused her.

The trial court overruled Williams' *Batson/Wheeler* objection, stating:

> I do not think, as I analyze it, that the one part of the rationale of the prosecutor is valid. I do not think that because I do not think that it can be fairly said that [Juror X] came in here and wanted to serve someplace so that she could return a verdict in favor of Mr. Williams because she shared the same ethnic background or race . . .
>
> So with all due respect, I do not believe it to be valid that one can say that in a case such as this, one will

> not keep a black person because that person is going to not follow the law.
>
> On the other hand, having set that aside, I think that the other reasons advanced by [the prosecutor] are entirely legitimate. I noticed her demeanor. I notice there was a difference between the way she responded to one side versus the other, and I notice her evasive answers – what I considered to be in a polite way, evasive answers. With regard to her attitude and her prior involvement and those factors, I think they are legitimate reasons for the exercise of the peremptory challenge. . . .

Williams was found guilty and he appealed to the California Court of Appeal, which affirmed the convictions. In addressing the *Batson* issue, the court held that the trial court had misunderstood the prosecutor's comments about the prior hung jury. In the court's view, the prosecutor did not say that Juror X would ignore the law because an African American had done so in the first trial. Instead, he was simply explaining his general preference for racial diversity on juries and practice of working to ensure diversity in selecting juries. The California Court of Appeal held that the reasons given for striking Juror X were race-neutral, that the trial court had adequately evaluated the prosecutor's credibility, and that Williams failed to prove purposeful discrimination.

After properly exhausting his state remedies, Williams filed this petition under 28 U.S.C. § 2254, which a magistrate denied.

Discussion

We review *de novo* a district court's denial of a petition under 28 U.S.C. § 2254. *Lewis v. Lewis,* 321 F.3d 824, 829

(9th Cir.2003). A federal court will grant habeas relief only if the state court decision was (1) "contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States" or (2) "based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." 28 U.S.C. § 2254(d)(1)-(2). We presume that "state courts know and follow the law," and that their factual findings are correct in the absence of clear and convincing evidence to the contrary. *Lewis,* 321 F.3d at 829 (quoting *Woodford v. Visciotti,* 537 U.S. 19, 24, 123 S.Ct. 357, 154 L.Ed.2d 279 (2002)); 28 U.S.C. § 2254(e)(1). We review the last reasoned decision of the state court, which in this case was made by the state court of appeal. *Ylst v. Nunnemaker,* 501 U.S. 797, 803-04, 111 S.Ct. 2590, 115 L.Ed.2d 706 (1991). But because that court examined and adopted some of the trial court's reasoning, the trial court ruling is also relevant. *Lewis,* 321 F.3d at 829.

Our review of a habeas ruling is limited by the Certificate of Appealability. 28 U.S.C. § 2253(c)(1), (3). The COA was granted "as to the issue of whether the district court erred by determining that the state court's denial of petitioner's *Batson-Wheeler* challenge was not an unreasonable application of established federal law." Since the COA did not exclude review of the factual underpinnings of the state court rulings and Williams' claim has always hinged on how the facts are characterized, we also may review whether the state courts unreasonably construed the facts. 28 U.S.C. § 2254(d)(2). *See Furman v. Wood,* 190 F.3d 1002, 1005 (9th Cir.1999) (construing COA liberally to review issue that COA did not specifically exclude).

Williams' *Batson* challenge is evaluated in three steps. First, he must make a prima facie showing that the

prosecutor exercised a peremptory challenge because of race. *Batson,* 476 U.S. at 96-97, 106 S.Ct. 1712. Then, the burden "shifts to the State to come forward with a neutral explanation for challenging black jurors." *Id.* at 97, 106 S.Ct. 1712. If that is done, the trial court must determine whether Williams carried his ultimate burden of proving purposeful discrimination. *Id.* at 98, 106 S.Ct. 1712.

Williams first contends that the state courts misapplied the second *Batson* step.[2] At this phase, any explanation based on something other than race will constitute a race-neutral reason unless discriminatory intent is inherent in that explanation. *Hernandez v. New York,* 500 U.S. 352, 359-60, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991). The reasons must be taken at face value at this step because any determination about the credibility of the explanation is reserved for the third step, where the court ultimately determines whether discrimination occurred. *Purkett v. Elem,* 514 U.S. 765, 767-68, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995). The facial validity of proffered reasons is an issue of law reviewed *de novo. Tolbert v. Page,* 182 F.3d 677, 680 n. 5 (9th Cir.1999).

The prosecutor gave four reasons for striking Juror X: (1) he feared she would identify with Alice Stowe and fail to view Stowe's testimony objectively; (2) her apparent lack of forthrightness about her prior trial experience; (3) her demeanor evincing bias in favor of the defense; and, (4) her knowledge of the case through press coverage. Williams does not dispute that, taken at face value, these

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[2] The parties do not dispute that a *prima facie* showing of discrimination was made. *See Hernandez v. New York,* 500 U.S. 352, 359, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991).

reasons are valid, "based on something other than the race of the juror," specific to the case, and did not appear to be mere proxies for racial stereotyping or discrimination. *Hernandez,* 500 U.S. at 360, 111 S.Ct. 1859. They are thus facially valid.

Williams argues, however, that in discussing the African American juror who had refused to deliberate in the first trial, the prosecutor gave an additional reason for striking Juror X that the court of appeal failed to recognize as discriminatory. He claims the prosecutor made it clear in those comments that he did not want Juror X on the jury because she was the same race as the recalcitrant juror from the first trial.

The context and entirety of the prosecutor's statement do not support Williams' interpretation. The comments merely describe the prosecutor's preference and practice of seating jurors of the same race as the defendant in an effort to bolster community confidence in the verdict. That practice had backfired in the first trial when he ignored race-neutral warning signs displayed by an African American juror. Because of that experience, the prosecutor explained, he could not ignore his similar concerns over Juror X's willingness to follow the law. The prosecutor did not reveal that he had singled out Juror X for a peremptory because of her race. Instead, he emphasized that he would have immediately struck her, but "because she was black [he] bent over backwards to try to find a justification . . . for keeping her" on the jury. His comments were a clumsy yet benign attempt by the prosecutor to bolster his claim of race-neutrality by providing context to his proffered reasons. They do not evince an inherent racial bias.

Williams' confusion is understandable. In a society where racial discrimination occurs frequently, it is easy to find it even in its absence. We split hairs over test scores, although everybody knows that admission to college is not and cannot be based on test scores alone. A mention of gender sometimes elicits a question of discrimination even in situations in which gender is merely descriptive. The situation might be as Johnny Cash indicated in an interview for publication near the end of his life:

> Ques. Do you think of yourself as a Christian artist?
>
> Ans. I'm an artist who is Christian. I'm not a Christian artist.

When one's race or gender or religion is not used to give one an advantage at the expense of another, its mention solely in a descriptive context is not discrimination per se.

Williams argues that in deeming the prosecutor's comments on the first trial "invalid," the trial court made a factual determination that race motivated the peremptory strike. He contends that in re-interpreting the comments, the appellate court usurped the trial court's fact-finding function. The second *Batson* step answers a legal, not a factual question. The appellate court is required to independently review those comments to determine whether they evinced discriminatory intent. *Tolbert,* 182 F.3d at 680 n. 5. The California Court of Appeal did so. It also correctly analyzed the import of the prosecutor's words after examining them in context. It did not unreasonably apply federal law in holding the prosecutor satisfied his burden under the second *Batson* step.

Williams next argues that the trial court abdicated its duty to perform the third *Batson* step. He claims that after setting aside the single, invalid reason, the trial court simply accepted the other proffered reasons – without analyzing the prosecutor's credibility – to find legitimate grounds for striking Juror X.

At the third *Batson* step, the trial court ultimately determines whether there was intentional discrimination. *Hernandez,* 500 U.S. at 359, 111 S.Ct. 1859. "The decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed." *Id.* at 365, 111 S.Ct. 1859. The trial court must not simply accept the proffered reasons at face value; it has a duty to "evaluate meaningfully the persuasiveness of the prosecutor's [race]-neutral explanation[]" to discern whether it is a mere pretext for discrimination. *United States v. Alanis,* 335 F.3d 965, 969 (9th Cir.2003).

Although explicit findings on credibility were never made, the state court of appeal examined the trial court's ruling and concluded it had made a "sincere and reasoned" attempt to evaluate the prosecutor's credibility as *Batson* required. On habeas review, state appellate court findings – including those that interpret unclear or ambiguous trial court rulings – are entitled to the same presumption of correctness that we afford trial court findings. *See Palmer v. Estelle,* 985 F.2d 456, 459 (9th Cir.1993) (applying presumption of correctness to appellate court holding that ambiguous and unclear trial court ruling was proper application of *Batson); see also Pollard v. Galaza,* 290 F.3d 1030, 1033 (9th Cir.2002).

Applying this presumption, the court of appeal reasonably construed the trial court's oral ruling. During

argument on the challenge, the trial court acknowledged that Juror X had been evasive and distant with the prosecutor, but friendly and open with defense counsel. In denying the *Batson* challenge, the trial court found "entirely legitimate" reasons for striking Juror X, based on her demeanor, the way she "responded to one side versus the other," and her "evasive answers." The trial court did not merely accept the prosecutor's explanation at face value; it evaluated his statements in light of the evidence to discern whether he was being truthful. The state court of appeal reasonably concluded that the trial court fulfilled its duty under the third *Batson* step.

Williams finally challenges the state courts' findings that he failed to meet his burden of proof under the third *Batson* step. Because a trial court's finding on purposeful discrimination rests largely on credibility, "a reviewing court ordinarily should give those findings great deference." *Batson,* 476 U.S. at 98 n. 21, 106 S.Ct. 1712. For us to set aside the state courts' findings on discriminatory intent, Williams must rebut the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). We must be left with a firm conviction that the determination made by the state court is wrong and the one urged by Williams is correct. *See Torres v. Prunty,* 223 F.3d 1103, 1107 (9th Cir.2000) (quoting *Van Tran v. Lindsey,* 212 F.3d 1143, 1153-54 (9th Cir.2000)).

The trial judge had the unique opportunity to observe the demeanor of the prosecutor as he justified the peremptory strike, as well as Juror X as she interacted with counsel during voir dire. *See Hernandez,* 500 U.S. at 365, 111 S.Ct. 1859 ("As with the state of mind of a juror, evaluation of the prosecutor's state of mind based on demeanor and credibility lies 'Peculiarly within a trial

judge's province.' ") (Citations omitted). Upon doing so, the trial court saw what the prosecutor had seen; Juror X seemed friendly with defense counsel but was cold and evasive toward the prosecutor, particularly when pressed for details about her prior trial experience. As the primary arbiter of credibility, the trial court was entitled to find this evinced Juror X's possible bias. *See Burks v. Borg,* 27 F.3d 1424, 1429 & n. 3 (9th Cir.1994) (noting that prosecutor's evaluation of a juror's demeanor, tone, and facial expressions may lead to a "hunch" or "suspicion" that the juror might be biased, and that a peremptory challenge based on this reason would be legitimate); *see also, e.g., United States v. Power,* 881 F.2d 733, 740 (9th Cir.1989) (accepting as legitimate prosecutor's explanation that a juror's "fidgeting and looking around as he sat in the jury box . . . made the prosecutor believe that the individual would not be an attentive juror"). The trial court reasonably found the prosecutor to be credible when he expressed concern over Juror X's ability to be fair.

Williams contends that the record undermines some of the prosecutor's reasons for the peremptory, exposing them as pretexts for discrimination. *See McClain v. Prunty,* 217 F.3d 1209, 1221 (9th Cir.2000) ("Where the facts in the record are objectively contrary to the prosecutor's statements, serious questions about the legitimacy of a prosecutor's reasons for exercising peremptory challenges are raised.") He argues that two jurors had voted to acquit after deliberating for two days, not one, as the prosecutor claimed. This contention fails. The prosecutor's comments about the first trial were not reasons for the challenge but merely background information to support his race-neutral explanation. Contrary to Williams' assertion, the prosecutor stated that the African American had been "one

of the reasons" the jury had hung; he did not identify that juror as the sole cause of the mistrial.

The record fails to support Williams' assertion that in striking Juror X because she was in the "same situation" as Alice Stowe, the prosecutor revealed a discriminatory motive because Stowe is African American. The prosecutor believed Juror X might identify with Stowe for reasons other than race; they had sons of a similar age. It was Williams who claimed that the women's race was on the prosecutor's mind in discussing their similarity. Upon assessing the prosecutor's credibility, the trial court could properly reject Williams' claim and conclude the prosecutor was genuinely concerned that the non-racial similarities might hinder Juror X's ability to view Stowe's testimony objectively.

The record refutes Williams' claim that the prosecutor revealed a discriminatory motive by failing to strike a white juror who, like Juror X, knew about the case from press coverage. Disparate treatment of otherwise similarly situated jurors can support the inference that reasons given for a peremptory challenge are mere pretexts. *Lewis,* 321 F.3d at 832-33; *but see Burks,* 27 F.3d at 1429 (rejecting assertion that *Batson* violation occurs "whenever prospective jurors of different races provide similar responses and one is excused while the other is not"). As the prosecutor noted, the white juror did not appear to know as much as Juror X; he was only vaguely familiar with some of the names and could recall few specifics. In contrast, Juror X knew about the case from reading the newspaper and watching television every day, she remembered fairly clearly what had been reported, and she recalled specific facts.

The California Court of Appeal reasonably applied federal law and reasonably interpreted the facts in holding (1) that the prosecutor proffered race-neutral reasons for striking Juror X, (2) that the *Batson* framework had been properly applied by the trial court, and (3) that Williams failed to meet his ultimate burden of proving that the prosecutor was motivated by Juror X's race in using a peremptory challenge to remove her from the jury panel.

AFFIRMED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CLOSED
DATE: 1/4/02

HURSHEL WILLIAMS,	)	**No. CIV F-01-5153 HGB P**
Petitioner,	)	**ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS**
v.	)	
LARRY RHOADES, et al.,	)	(Filed Jan. 4, 2002)
Respondent.	)	

Petitioner is a state probationer represented by counsel proceeding with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. The parties hereto having voluntarily consented to this action being assigned to a magistrate judge for all purposes within the meaning of 28 U.S.C. § 636(c), on November 13, 2001, this action was assigned to the undersigned.

BACKGROUND

In the Superior Court of the State of California, County of Kern, after trial by jury, petitioner was convicted of conspiracy to defraud, misappropriation of public funds, and grand theft by false pretenses. On September 19, 1996, petitioner was sentenced to state prison for two years but released on bail pending appeal.

The judgment was affirmed by the Fifth District Court of Appeal (hereinafter "5th DCA") in an unpublished opinion filed on August 4, 1999. The California Supreme Court summarily denied review on November 10, 1999.

Following conclusion of his direct appeal, petitioner filed a motion in the trial court for reconsideration of the sentence imposed. The motion was granted and petitioner was placed on probation for a period of five years on condition that he serve one year in custody and make restitution to the Lost Hills Water District.

In his petition to this court filed on February 6, 2001, petitioner alleges two grounds for relief: (1) the prosecutor peremptorily challenged the only black juror on the panel for discriminatory reasons and the trial court erred in denying petitioner's motion made pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986) and *People v. Wheeler*, 22 Cal.3d 258 (1978), (hereinafter "*Batson-Wheeler* motion") and (2) denial of petitioner's right to confrontation by prohibiting cross-examination of a prosecution witness regarding his bias in favor of the prosecution.

Respondent's answer, filed on August 22, 2001, concedes petitioner has exhausted his state remedies.

Petitioner's traverse was filed on October 12, 2001.

DISCUSSION

Denial of *Batson-Wheeler* motion

In *Batson* the United States Supreme Court held, " . . . the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." 106 S.Ct. at 1716. In *Wheeler* the California Supreme Court held that under Article I, section 16 of the California Constitution, "[T]he use of peremptory challenges to prospective jurors on the sole ground of

group bias violates the right to trial by a jury drawn from a representative cross-section of the community." 22 Cal.3d at 277. Group bias is the assumption that "certain jurors are biased merely because they are members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds. . . ." 22 Cal3d at 276.

In *Hernandez v. New York*, 500 U.S. 352 (1991), the U.S. Supreme Court noted several pertinent principles regarding cases where exclusion of jurors by the prosecution on the basis of group bias is claimed.

> "In evaluating the race neutrality of an attorney's explanation, a court must determine whether, assuming the proffered reasons for the peremptory challenges are true, the challenges violate the Equal Protection Clause as a matter of law. . . .
>
> "A neutral explanation in the context of our analysis means an explanation based on something other than the race of the juror. At this step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reasons offered will be deemed race neutral.

500 U.S. at page 360 (internal citations omitted).

> "The trial judge in this case chose to believe the prosecutor's race-neutral explanation for striking the two jurors in question, rejecting petitioner's assertion that the reasons were pretextual. In Batson [*Batson v. Kentucky*, 476 U.S. 79] we explained that the trial court's decision on the

> ultimate question of discriminatory intent represents a finding of fact of the sort accorded great deference on appeal: . . . .
>
> "Deference to trial court findings on the issue of discriminatory intent makes particular sense in this context because, as we noted in Batson, the finding 'largely will turn on evaluation of credibility.' [] In the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed. There will seldom be much evidence bearing on that issue, and the best evidence often will be the demeanor of the attorney who exercises the challenge. As with the state of mind of a juror, evaluation of the prosecutor's state of mind based on demeanor and credibility lies 'peculiarly within a trial judge's province.'"

500 U.S. 352 at page 365 (internal citations omitted).

The 5th DCA summarized the proceedings leading to the denial of petitioner's *Batson-Wheeler* motion:

> Juror X entered the jury box during the late afternoon of the first day of voir dire. When the court inquired how she felt about serving as a juror in this particular case, she responded "okay, considering[,]" then explained she had been unsure her health would "hold up." She decided not to call and ask for an excuse; "I just wanted to come and serve on jury duty. She stated she was feeling fine presently. She did not know anyone in the courtroom and stated that all she knew about this case was what she had read a year ago. She did not believe everything she read and would not base her vote on what she had read.

Under questioning by defense counsel, Juror X stated she had some clear – and some not so clear – recollections of what she had read in the paper and viewed on the evening news the previous year, but believed she could put those memories out of her mind. She thought she would be an acceptable juror to either the defense or prosecution; in her mind what was important was being "honest."

Further questioning by defense counsel revealed that Juror X described herself as a homemaker on her questionnaire; she had not worked outside the home in the last ten years and, as she had told the court, presently felt "okay" physically. She expressed some surprise when defense counsel asked her if she would be comfortable sitting and listening to evidence for five days if that was how long the case took to resolve:

> "A. Five day, I thought he said three? I don't know about five, I really don't. I feel that I'm okay. That's just the way I am, if the doctor tells me you can't drive I say oh, I have to that's just the way I am. I say I can't live sitting still, I have to get to the store, I have to drive to go to the store."

In response to defense counsel's query, she acknowledged she would feel better about serving as a juror if she could raise her hand ask the court for a recess if she were experiencing physical discomfort. Defense counsel passed for cause. The prosecutor remarked that Juror X had disclosed in her questionnaire that she had testified once before in a legal proceeding and asked her to elaborate. She responded:

"A. A murder trial.

"Q. Pardon me?

"A. A murder trial.

"Q. And were you called as a witness by either side?

"A. Yes.

"Q. How long ago was that?

"A. It was a long time ago.

"Q. More than five years?

"A. Oh, yes.

"Q. Were you called by the prosecution or by the defense?

"A. Which one was it? I can't remember, it's been so long. Which one? It's really been a long time, it's been over ten years even.

"Q. Was it here in Kern County?

"A. Yes.

"Q. Okay. Do you remember having had any impression in that case as to whether or not the individual who was charged was guilty or not?

"A. No, no.

"Q. At the conclusion of the case, without telling me what happened, were you disappointed in the verdict?

"A. No.

"Q. Okay. You've indicated you've told us that you have heard something about this case?

"A. Uh-huh.

"Q. Is it yes?

"A. Yes, yes.

"Q. And that's both in the newspaper and also on the television?

"A. Yes.

"Q. Prior to – well, do you have an opinion as to what happened in this case based upon what you've heard? I'm not asking what it is.

"A. No, huh-uh.

"Q. Do you recall some of the facts that you've heard about this case?

"A. Well, I didn't know if it was fact or not. You know, how it just comes cross the screen, you don't know if that's fact, you don't know which one is actually guilty. If you have a lot of people involved you don't know until trial.

"Q. Right. But do you remember some of the things you heard?

"A. Yes, I do."

The court then inquired if Juror X was taking medication and if it ever made her drowsy – or cranky. She acknowledged she did take medication and occasionally it made her drowsy but not cranky. She agreed to let the court know if she became drowsy. The prosecution passed for cause. The prosecutor then exercised a peremptory challenge of another juror. The court seated

the replacement juror and more extensive questioning of that juror by the court and defense counsel consumed the brief balance of the afternoon session. When court reconvened the next morning, defense counsel stated he was ready to accept the jury as presently constituted. The prosecutor then excused Juror X. Immediately defense counsel requested a sidebar, which was not reported, after which voir dire continued until each side was satisfied tentatively with the seated panel. At that time the court removed the jury panel and noted on the record that, during the sidebar, defense counsel had requested the opportunity to make a Wheeler motion. It was agreed at that point to defer the motion to a time when both counsel appeared ready to accept the panel. It was further agreed that conducting the motion at the more convenient point would be deemed timely. The court recalled that, at the sidebar, it had determined Juror X was the only member of the jury panel who appeared to be African-American and that the defendant was African-American. The court stated: "I've indicated I was prepared to find a prima facie case, such that the prosecution would be required, if it could do so, to justify its exercise of the peremptory which will take care of it procedurally. It then directed the prosecutor to explain his reasons for the peremptory challenge.

"MR. MITCHELL: Your Honor, as I indicated during our sidebar, this particular juror was somebody that I had thought about challenging yesterday. The break last night came at an opportune time. It afforded me to have even more time. The more I reflected on it, I was absolutely confident in my own decision that I had to, in the

interest of my client, challenge her by way of peremptory, and I'll list the reasons.

"First of all, by way of background. One of the original defendants in this case is a woman by the name of Alice Stowe who was Dennis Stowe's mother. It's alleged in the conspiracy that at the time she worked for the Wasco branch of Union Bank, that she worked when a number of checks that were made out to an individual by the name of Andrew McMillen, M-c-M-i-l-l-i-n; McMillan, M-c-M-i-l-l-a-n; and McMillan, M-c-M-i-l-l-a-n [sic].

"Alice Stowe was charged as part of this conspiracy in February of this year. I gave Alice Stow immunity over her objection, and the last thing she wanted was immunity so she could have to come in here to testify because I want the jury in this case to hear about her involvement and about Mr. Williams' involvement with respect to those checks. It was the only way that I was going to be able to put on testimony with respect to those checks, and I believe and I will argue they were payoff checks.

"Alice Stowe happens to be African American or black. Her son, Dennis Stowe, was the superintendent at the Lost Hills Water District at the time of this – of these incidents and was fired or resigned after the investigation. Alice Stowe testified at the earlier trial, she's testified at the preliminary hearing, and I will represent to the Court that I intend to bring her into court and have her testify as well.

"Alice Stowe's testimony, I believe, is one of the critical components of this case. On the one hand, I have the invoices and the circumstantial

evidence that shows that Mr. Williams was purchasing a set number of meters and registers and water gates from McCrometer and also from water manufacturers and was then selling sometimes three and four times as many to Lost Hills Water District. I also have what I believe are seven payoff checks from Hurshel Williams which were being cashed by Alice Stowe.

"It's important that the jury, when they look at her testimony, when they listen to her testimony, they determine for themselves if they believe she's credible, whether or not she has a good explanation for that. Alice Stowe is almost in virtually the same situation as the jury [sic].

"Yesterday, when I went through the profile, the questionnaire, I noticed the number of children she had, and she had a son the same age as Dennis Stowe. That is a significant factor.

"Another factor that was significant to me and it was a primary factor, the fact she indicated she had testified as a witness before on – in a prior proceeding. She didn't give any further elaboration in the questionnaire so I asked her about that yesterday.

"She testified or told us yesterday in the jury voir dire that she testified in a murder case, and at first, she said it was over five years, then as I began to ask her more questions, and I told her I really wasn't trying to be intrusive, I need to find out the background, she began to back off. She said, 'Well, it was 10 years. It was a long time ago.'

"And I have a little bit of experience trying cases. I've tried over a hundred cases with juries. I watched her demeanor as she dealt with Mr.

Enson. When she talked to Mr. Mitts, she was very open, she smiled, she was very responsive. When I asked her questions – and the Court can make the only determination whether I was being rude yesterday; I believe I wasn't – she wouldn't look me in the eye. When I asked her about the question in the murder case, she looked away.

"It's hard to tell from the record, because the record is silent on this, but I would like the record to reflect there was, in fact, a pause, a significant pause after I asked her that question which was: Did you testify for the prosecution or for the defense? There was a significant pause, and she said, 'Well, the case was over 10 years ago.' That's when she began to back off, and then she indicated to me she couldn't tell me; she didn't know.

"She also indicated that she knows that she's one juror who's seated up here who has some recollection in the specific news events from the newspaper and from television. She said both. She remembers from television and the news, and she didn't say, as some of the jurors did, 'I have a general recollection of the facts of this case.'

"She said in response to Mr. Mitts' inquiry, 'I have specific recollections of some of the facts, but I'm willing to discount those.' And I don't remember the exact language. I wish I would have written this down. Something to the effect: You don't now if they were all here or not, which would lead me to believe that she already knows that Dennis Stowe and Donald Moore were convicted.

"That's irrelevant. My primary concern was the fact I wasn't getting honest answers from her. I didn't feel that she was candid with me. I don't think Alice Stowe's testimony will be with an objective frame of mind, but there's more, your Honor.

"This is the fourth time now that I have tried personally one of these Lost Hills Water District cases. The one on Dennis Stowe lasted all summer, a year ago to the day. I left – deliberately left a black juror on that case. I felt it was the responsibility, the consensus of the community in the form of the verdict. I think it gives more weight and more authority to the jury.

"Quite frankly, when there are all different ethnic persuasions, here's what we find to be the truth: That the jury came back and convicted in the Donald Moore case. The chairman, chair foreman of that jury was, in fact, black. And in the last case that I tried, the one that hung up, it was the case of People versus Hurshel Williams that hung up. One of the reasons it hung up I had an African American juror who went back and nullified that jury because of race, solely because of race, and I had left that juror on, again, because I wanted to make a statement to the connnunity [sic] that this was a fair and impartial jury. The lesson that I learned was that I had ignored some significant factors in that juror's background, one that I would have ignored was that juror was of any racial background.

"Just as the Court will recognize yesterday, I have challenged three jurors, two of them were white, and the third juror of whom was black. Two of those jurors I specifically excused because I was concerned about jury nullification.

"Ms. (045079), who was one of the last jurors chosen yesterday or selected to sit up there in spot number two, talked about her great compassion that she had for individuals and her concern that an innocent man might be convicted. And I was concerned, not withstanding the fact she gave me the quote, right answers, she'd be able to set that aside.

"As to jury nullifications, your Honor, I struggle with this. In this county, we don't have a lot of black jurors to sit on juries. There's nothing I would want more of. I mean that truly. But in this specific case, with this specific juror – this is the only black juror that I have excused to my knowledge since I've been back in the district attorney's office last April – but this particular juror, having looked at her answers and watched the way she responded to me, I felt I had no other alternative but to represent my client and to exercise that peremptory challenge.

"And I will, of course, live with whatever the Court rules. Those are my reasons. They were arrived at honestly and sincerely, and those are my justifications.

"THE COURT: Thank you. Mr. Mitts?

"MR. MITTS: Mr. Mitchell's most telling comment was the one regarding what happened in this trial last time where, according to his assessment, an African American juror hung this trial up.

"Now we have one African American juror who makes it to the jury box who happens to be a lady – I don't what her age was – but she was a lady probably in her 50's or 60's, probably about the same age as Alice Stowe.

"And it's also telling that Mr. Mitchell's comments, when he's talking about her ability, [Juror X's] ability, to assess the evidence in this case, doesn't relate to Dennis Stowe, doesn't relate to Danny Howard, it relates to how [Juror X] is going to view Alice and the obvious implication that [Juror X's] being a black African American older woman is going to identify with Alice Stowe, a black American African older woman, and she is going to, because of her race, vote not guilty in this case and we're going to have a hung jury.

"I would say Mr. Mitchell surmises the same thing that he thinks occurred last time, i.e., an African American juror holding up or tying up or hanging up this jury. And even though there was some other comments that Mr. Mitchell made about she having a son the same age as Dennis Stowe, she had testified in the murder case, she seemed to be more friendly to me than Mr. Mitchell, and she had some recollection of newspaper articles and the TV accounts, the common theme that ran through Mr. Mitchell's explanation was Alice Stowe, Alice Stowe, Alice Stowe, – and I think the clear implication that [Juror X] was let go because Mr. Mitchell feared, because of race, that she would identify with Alice Stowe and she would hang this jury up.

"THE COURT: Thank you. Mr. Mitchell, your response – and in particular, I would suggest that I'm prepared to make the findings with regard to the demeanor of [Juror X]. It was readily apparent to me that in her responses to Mr. Mitts, she was more open, she was more quick to smile and to respond than to you. I agree also that she was evasive.

"And I was somewhat surprised with regard to that murder case that she could not recall which side had called her. Because it's not as if one were just coming in on a fender bender case but instead on a murder case. One would think, whether it was five years ago or ten years ago, even a poor historian like me would find that to be a significant event in one's life and would have a pretty good idea of how long ago that was and which side called me to testify.

"And I agree that there were some pauses, and I will accept your representation that in the first case you had a black juror and that case resulted in a conviction. You did not say so, but I think I saw something in your trial brief indicating that on that second case where your foreperson was a black juror, that there was a conviction also. And you are nodding affirmatively.

"What, quite frankly, bored [sic] me was with regard to your comment that on this particular case, when this one was tried, that it was a black juror who caused a deadlocked verdict because of race or because of jury nullification. Id be awfully curious as to how you came to that conclusion.

"MR. MITCHELL: Your Honor, I came to that conclusion talking to jurors out in the hallway. The jurors in that hallway were very angry afterward. They told me that at the outset that the individual walked into the jury room and said, 'I don't care what the facts are. I'm not voting guilty.' And it was because of race.

"That, at one time, they thought if-they had some testimony read back, perhaps they would persuade that individual. That individual pulled

out a paperback book novel and refused to participate. And I, quite frankly, had to reassess my own views in jury selection. I'm providing the Court with the most complete record I can so the Court can make its own recollections.

"I've – quite frankly, I have my mind set. I've bent over backwards, I have a defendant of African American persuasion, at least one person in the community that matches their ethnic persuasion on that case. That's the point I'm trying to make.

"But I think the lesson that I've learned is that you can't be blind to the other things that they're telling you. If you've got a juror up there telling you, for whatever reason, there's not, you have to be blind as to race. You can't assume that, well, okay, because they happen to be of the same ethnic persuasion of the defendant, I'm going to allow them to be on the jury. We can't be blind in our society. There are people whose sole purpose is to get on a jury just solely so they can nullify the verdict.

"I'll live with whatever this jury comes back with as long as they deliberate and they consider the evidence fairly and they arrive at a fair verdict. What I cannot abide by is going in and investing five or six days in a case like this for a second time knowing that at the very outset, there's an individual who already is predisposed against us.

"That's why I excused Ms. (045079) yesterday, and that's why I excused [Juror X] today. And my initial reaction, if she had not been black, if [Juror X] had not been black, I would have excused her as soon as she was done. I

might have excused her as to cause because she testified in a murder case, couldn't remember, et cetera, et cetera. Because she was black, I bent over backwards to try to find a justification in my mind for keeping her, and I couldn't. That's why I excused her.

"THE COURT: Thank you. The motion is denied. I do not think, as I analyze it, that the one part of the rationale of the prosecutor is valid. I do not think that because I do not think that it can be fairly said that (Juror X] came in here and wanted to serve someplace so that she could return a verdict in favor of Mr. Williams because she shared the same ethnic background or race. In fact, my rationale for that finding is that on the two previous cases where convictions were had, one, the foreperson was black and the other there was one black juror out of the 12.

"So with all due respect, I do not believe it to be valid that one can say that in a case such as this, one will not keep a black person because that person is going to not follow the law.

"On the other hand, having set that aside, I think that the other reasons advanced by Mr. Mitchell are entirely legitimate. I noticed her demeanor. I noticed there was a difference between the way she responded to one side versus the other, and I noticed her evasive answers – what I considered to be in a polite way, evasive answers. With regard to her attitude and her prior involvement and those factors, I think they are legitimate reasons for the exercise of the peremptory challenge."

Slip Opinion, pp. 5-14, footnotes omitted.

Under what has become known as the *Batson* test, the first step is to determine whether a prima facie showing of racial discrimination has been made. If it has, the second step shifts the burden to the prosecutor to provide a race-neutral explanation. The third step requires the trial court to decide whether purposeful racial discrimination has been shown. "The second step of this process does not demand an explanation that is persuasive, or even plausible. . . . Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Purkett v. Elem*, 115 U.S. 765, 767 (1995); see also *Hernandez v. New York*, 500 U.S. 352, 360 (1991)

In the instant case, the experienced trial judge heard the prosecutor's long and somewhat convoluted explanation as set forth above and accepted the prosecutor's race neutral reasons for peremptorily challenging Juror X. "Since the trial judge's findings in the context under consideration here largely will turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference. *Batson*, 476 U.S. at 98, n. 21.

Additionally, three justices of the 5th DCA carefully reviewed the prosecutor's explanation and unanimously concluded:

> The prosecutor offered adequate justification, in the form of facially race-neutral reasons unrelated to group bias, for the exercise of the peremptory challenge to Juror X. (*People v. Sandoval* (1993) 4 Cal.App. 4th 155, 174-175.) He gave reasons that tied Juror X to the facts of the case; the reasons were not mere proxies for group bias. In addition, it is worth noting that it does not appear the prosecutor had a "previous

> plan" to challenge Juror X. He did question her, and not in an indifferent manner, in an attempt to expand on her answer in the questionnaire and to assess the extent of her knowledge of the ongoing District Trilogy prosecutions. (See *People v. Motton* (1985) 39 Cal.3d 596, 607, fn. 3.) Juror X was not the only juror the prosecutor challenged peremptorily.

Slip Opinion, p. 21

Applying the rules promulgated by the United States Supreme Court set forth above, the trial judge having believed the prosecutor's race neutral explanation for the challenges and there being no discriminatory intent inherent in the prosecutor's explanation, there is no basis for this court to find otherwise.

Denial of petitioner's right to confrontation

James Van Pelt was a prosecution witness who testified on direct examination that he had sustained a felony conviction some four years earlier. Before beginning his cross-examination, defense counsel requested a sidebar conference in which he informed the court that he wished to have Van Pelt admit that his felony conviction was for possession of cocaine and that at the time he was questioned by the investigating officer, detective Dennis McBride, about this case, Van Pelt was on formal probation for the felony conviction. The court ruled that even though possession for cocaine was not a crime of moral turpitude he would allow defense counsel to elicit the nature of the felony conviction, but that counsel could not question Van Pelt concerning his probationary status. Petitioner claims that by prohibiting impeachment of Van Pelt through questioning concerning his probationary

status, petitioner was denied his Sixth Amendment right to confront and cross-examine witnesses against him.

This claim was raised on petitioner's direct appeal and after an exhaustive review of the evidence presented at trial three justices of the 5th DCA concluded that even if the trial court erred in its ruling precluding defense counsel's questions concerning Van Pelt's probationary status, the error was harmless. In so doing, the California justices acknowledged the United States Supreme Court's admonishment that "the exposure of a witness' motivation in testifying is a proper and important function of cross-examination." *Davis v. Alaska*, 415 U.S. 308, 311, 317-318 (1974). The justices had also reviewed Van Pelt's testimony given in petitioner's prior trial, which ended in a mistrial, where defense counsel was allowed to question Van Pelt at length concerning his probationary status when being interviewed by Detective McBride. The 5th DCA then concluded:

> Williams argues that Van Pelt's acknowledgement in the first trial that he was on probation and his "express admission" that he did not want to "'get into any trouble'" with McBride demonstrated his bias in favor of the prosecution and his motivation in cooperating with the authorities and testifying against Williams, whom he admittedly did not know prior to the instant court proceedings. Williams reasons that since Van Pelt's testimony was "key" to the prosecution's theory that the various McMillers were fictional characters contrived as strawmen to facilitate the ongoing thefts, defense counsel's inability to establish Van Pelt's possible motivation for testifying for the prosecution resulted in prejudicial error. He underscores this point by mentioning that the first trial, where Van Pelt's

probation status was revealed to the jury, ended in a mistrial.

First, a reading of Van Pelt's testimony from the first trial in context shows he was no more concerned with "getting into any trouble" with McBride than with getting into trouble with any other person. In fact, Van Pelt was unsure what agency employed McBride. Even Van Pelt's reply to defense counsel's very pointed question at the first trial – "When you talked to Detective McBridge you wanted him to be happy with you when the conversation was over, didn't you?" – was apathetic and unconcerned, to wit, "Well, not necessarily. One way or the other."

Unlike the situation cited by Williams in *People v. Phillips* (1985) 41 Cal.3d 29, 48, Van Pelt was not looking for favorable treatment from law enforcement. He was not "vulnerable" vis-a-vis law enforcement, as was the witness in *Phillips*, whose attorney had entered into "some [undisclosed] agreement" with the prosecutor for the witness's testimony. The *Phillips*' witness had been charged with murder, along with Phillips, but was out of custody on her own recognizance. (*Id.* at pp. 45-46.) Rather, Van Pelt was nearing the end of his probationary period on an unrelated charge, apparently served without incident, when two of the seven checks to the various McMillers, drawn on Courtesy's checking account, were traced to Van Pelt's check cashing service. There is no indication in the record Van Pelt was ever charged with criminal conduct arising out of the cashing of the two checks, or that he was granted immunity in exchange for his testimony or that the threat of imminent prosecution was hanging over his head if he failed to "cooperate."

Nor is *People v. Adams* (1983) 149 Cal.App.3d 1190, cited by Williams, on point. There the defense was not allowed to cross-examine the state's primary witness regarding his status as a juvenile probationer. The probationer was the only witness to give direct testimony as to Adams's theft of checks and the only witness who could directly contradict Adams's explanation of the apparent forgery. This court found the trial court erred when it denied the defense the opportunity to probe for possible bias, prejudice or motive flowing from his status as a juvenile probationer. In *Adams*, the juvenile witness was in custody for another matter when he first discussed the case with the police. Here Van Pelt did not supply the type of singular, all-elements-of-the-offense, critical evidence provided by the probationer in *Adams*. Furthermore, Van Pelt was not on probation when he testified nor was he in custody when first questioned by McBride.

Van Pelt did not even know Williams prior to the instant prosecution – there is no evidence of any personal animosity toward Williams – Indeed, the evidence of any relationship with Williams that might impact Van Pelt's credibility, such as might be probed on cross-examination, is nonexistent. Rather, Van Pelt's rather grudging testimony was in part favorable to Williams in that Van Pelt could not state with absolute certainty that Stowe was alone on the two occasions when he cashed the Courtesy checks. This left the door open for the jury to believe some embodiment of the various McMillers was waiting in Stowe's truck, as defense counsel impliedly suggested. On this record, we find no abuse of discretion by the trial court.

> Even assuming, arguendo, the trial court erred in not allowing the defense to pursue Van Pelt's prior probationary status in the retrial. Williams suffered no discernible prejudice, for the reasons cited above. "The correct inquiry [on appeal] is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt." (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 684.) We are satisfied any error as claimed was harmless beyond a reasonable doubt. (*Ibid.*)

Slip Opinion, pp. 67-69.

In *Van Arsdall*, which was a direct appeal, the United States Supreme Court held, "The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say the error was harmless beyond a reasonable doubt." 475 U.S. at 684. Although "harmless beyond a reasonable doubt" is the correct standard for direct review, as the Ninth Circuit recently noted:

> [H]abeas review is more deferential. See Brecht v. Abrahamson, 507 U.S. 619, 637 (1993). . . . On habeas review, error is harmless unless it " 'had substantial and injurious effect or influence in determining the jury's verdict. Id. quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946). That is, the error is harmless unless [petitioner] can establish "actual prejudice." Brecht, 507 U.S. at 637 (internal quotation marks and citation omitted).

Garceau v. Woodford, ___ F.3d ___, 2001 WL 165456, *5.

Here, the California Supreme Court denied review of petitioner's direct appeal without comment or citation of authority. "In this circumstance, we 'look through' the unexplained California Supreme Court decision to the last reasoned decision, the state appellate court's decision, as the basis for the state court's judgment." *Shackelford v. Hubbard*, 234 F.3d 1072, 1079 n.2 (9th Cir. 2000.) See also *Ylst v. Nunnemaker*, 501 U.S. 797, 803-04 (1991); see also *Vansickel v. White*, 166 F.3d 953, 957 (9th Cir. 1999). The instant petition, filed on October 6, 2000, is reviewed under the provisions of the Antiterrorism and Effective Death Penalty Act which became effective April 24, 1996. *Van Tran v. Lindsey*, 212 F.3d 1143, 1148 (9th Cir. 2000). A state court's decision denying relief may be reversed only if that decision is "contrary to, or involves an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States." *Id.*, at 1149 (quoting 28 U.S.C. § 2254(d)(1). The distinction between the "contrary to" and "unreasonable application of" provisions of § 2254(d)(1) were noted in *Williams v. Taylor*, 529 U.S. 362, 405-09 (2000) and summarized by the Ninth Circuit in *Van Tran v. Lindsey*, 212 F.3d 1143, 1150 (9th Cir. 2000):

> A state court's decision can be "contrary to" federal law either 1) if it fails to apply the correct controlling authority, or 2) if it applies the controlling authority to a case involving facts "materially indistinguishable" from those in a controlling case, but nonetheless reaches a different result. A state court's decision can involve an "unreasonable application" of federal law if it either 1) correctly identifies the governing rule but then applies it to a new set of facts in a way that is objectively unreasonable, 2) extends or fails to extend a clearly established legal principle to a new

context in a way that is objectively unreasonable. (internal citation omitted).

Petitioner has the burden of establishing that the decision of the 5th DCA is contrary to or involved an unreasonable application of United States Supreme Court precedent. *Baylor v. Estelle*, 94 F.3d 1321, 1325 (9th Cir. 1996).

In the instant case, by reviewing Van Pelt's testimony while being cross-examined concerning his probationary status at petitioner's first trial, the state courts had the advantage being able to assess the damaging potential of that testimony and concluded that any error in precluding cross-examination on that subject at the present trail was harmless beyond a reasonable doubt. The California courts' decision identified the correct governing legal principles as established by the United States Supreme Court and applied those principles to the facts of petitioner's case. This court is unable to say the state courts' decision involved an unreasonable application of those principles.

Accordingly, IT IS HEREBY ORDERED That the petition for writ of habeas corpus is DENIED.

DATED: January 3, 2002.

/s/ Hollis G. Best
HOLLIS G. BEST
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

HURSHEL WILLIAMS,
Petitioner,
vs.
LARRY RHOADES, et al.,
Respondent. /

JUDGMENT IN A CIVIL ACTION

CIV F 01-5153 HGB HC

(Filed 1/8/02)

1/4/02 FILE CLOSED

DECISION BY COURT: This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that the petition for writ of habeas corpus is DENIED.

DATED: 1/8/02

JACK L. WAGNER, Clerk

/s/ [Illegible]
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HURSHEL WILLIAMS, Petitioner-Appellant, v. LARRY RHOADES; et al., Respondents-Appellees.	No. 02-15280 D.C. No. CV-01-05153-HGB Eastern District of California, Fresno ORDER (Filed Apr. 07, 2004)

Before: FARRIS, TROTT, Circuit Judges, and Weiner,* Senior District Judge.

The panel has voted to deny the petition for panel rehearing and deny the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.

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* Hon. Charles R. Weiner, Senior District Judge for the Eastern District of Pennsylvania, sitting by designation.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,
Plaintiff and Respondent,
v.
HURSHEL WILLIAMS,
Defendant and Appellant.

F026881
(Super. Ct. No. 65865)
OPINION
(Filed Aug. 4, 1999)

APPEAL from a judgment of the Superior Court of Kern County. James M. Stuart, Judge.

Riordan & Rosenthal, Dennis P. Riordan and Donald M. Horgan for Plaintiff and Appellant.

Daniel E. Lungren, Attorney General, George H. Williamson, Chief Assistant Attorney General, Robert R. Anderson, Assistant Attorney General, Edgar A. Kerry and Leah Ann Alcazar, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

DISCUSSION

In *People* v. *Wheeler*, *supra*, 22 Cal.3d 258, 276-277, the California Supreme Court held that the use of peremptory challenges by a prosecutor to strike prospective jurors *solely* on the basis of group bias[11] violates the right of a

[11] Group bias is the assumption that "certain jurors are biased merely because they are members of an identifiable group distinguished

(Continued on following page)

criminal defendant, under article I, section 16 of the California Constitution, to trial by a jury drawn from a representative cross-section of the community. In addition, such a practice violates a defendant's Fourteenth Amendment right to equal protection under the laws. (*Batson* v. *Kentucky* (1986) 476 U.S. 79, 84-89; *People* v. *Jackson* (1992) 10 Cal.App.4th 13, 18.) Under *Batson* and *Wheeler*, African Americans are a cognizable group. (*Batson* v. *Kentucky*, *supra*, 476 U.S. at pp. 84-89; *People* v. *Wheeler*, *supra*, 22 Cal.3d at p. 280, fn. 26.)

The protocol for establishing *Wheeler* error begins with a timely objection by the party who believes an opponent is using a peremptory challenge for a discriminatory purpose. Counsel for Williams made a timely objection and, in the court's estimation, established a prima facie showing of purposeful discrimination, to wit, that Juror X was excused for group bias, an improper reason.[12] At that point the burden shifted to the prosecution to establish a neutral explanation for the challenge that related directly to the case before the court. (*People* v. *Wheeler*, *supra*, 22 Cal.3d at pp. 280-282; *Batson* v. *Kentucky*, *supra*, 476 U.S. at pp. 98-99.) "The second step of this process does not demand an explanation that is persuasive, or even plausible. . . . 'unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral. . . .'" (*Purkett* v. *Elem* (1995) 514 U.S. 765,

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on racial, religious, ethnic, or similar grounds. . . ." (*People* v. *Wheeler*, *supra*, 22 Cal.3d at p. 276.)

[12] The court: "[Juror X] is the only member of the jury panel who appears to be African American or black. Mr. Williams is African American or black. . . ."

767-768.) To sustain this burden, "the allegedly offending party must satisfy the court that he exercised the peremptory challenges on grounds that were reasonably relevant to the issues, parties, or witnesses in the particular case on trial, i.e., for specific bias." (*People* v. *Wheeler*, *supra*, 22 Cal.3d at pp. 281-282; *People* v. *Jackson*, *supra*, 10 Cal.App.4th at p. 18.)

It is then the obligation of the trial court to make a "'sincere and reasoned attempt to evaluate the prosecutor's explanation in light of the circumstances of the case as then known, his knowledge of trial techniques, and his observations of the manner in which the prosecutor has examined members of the venire and has exercised challenges for cause or peremptorily. . . .'" (*People* v. *Johnson* (1989) 47 Cal.3d 1194, 1216, quoting *People* v. *Hall* (1983) 35 Cal.3d 161, 167-168.) At this point, plausibility plays a role. Implausible or fantastic explanations are likely to be found pretextual. (*Ibid.*, but see *Purkett* v. *Elem*, *supra*, 514 U.S. at p. 768.) "In ruling on a *Wheeler* motion, the decisive issue facing the trial court is whether 'the peremptory challenges in question were . . . predicated on group bias alone.' (*Wheeler*, *supra*, 22 Cal.3d at p. 281.). . . ." (*People* v. *Jackson*, *supra*, 10 Cal.App.4th at p. 20.) In sum, the court engages largely in a credibility evaluation to resolve a question of fact. (*Ibid.*)

Respondent emphasizes the following point: a defendant's right to a jury drawn from a representative cross-section of the community is violated "when the prosecution exercises its peremptory challenges to remove prospective jurors *on the sole ground of group bias.*" (*People* v. *Cervantes* (1991) 233 Cal.App.3d 323, 332, emphasis added.) In support of this proposition, respondent also cites *Wheeler*, *supra*, 22 Cal.3d at pages 278-280; *People* v. *Christopher* (1991) 1

Cal.App.4th 666, 669-670, and *Batson* v. *Kentucky*, *supra*, 476 U.S. at pages 96-97.)

Williams argues that is indeed the case here. He states "Mitchell thus made very clear that he did not want *an African American* on appellant's second jury because he had had one on the [first] jury that could not reach a verdict." (Emphasis added.)[13] Williams cites the following remark by the trial court, in response to the prosecutor's explanation, in support of that conclusion: "I do not believe it to be valid that one can say that in a case such as this, one will not keep *a black person* because that person is going to not follow the law." (Emphasis added.)

Our examination of the prosecutor's statements convinces us that Williams and the trial court missed the import of this portion of the prosecutor's explanation for his actions. The prosecutor never said he did not want "an African American" or "a black person" to serve on the jury. A thoughtful reading of the prosecutor's explanation, *in context*, is that the prosecutor believed having an ethnic mix on a jury gave it "more weight and more authority" and better reflected "the consensus of the community in the form of the verdict." As proof he practiced his professed belief, the prosecutor cited to the two prior Trilogy defendants' trials in which an African-American served on each jury. In Williams's first trial, he had allowed an African-American to remain on the jury "because I wanted to make a statement to the community that this was a fair

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[13] The prosecutor stated "*One of the reasons* [the first trial] hung up, I had an African American juror who went back and nullified that jury because of race, solely because of race. . . . " (Emphasis added.) The prosecutor did *not* attribute the mistrial solely to the alleged conduct of the African-American juror.

and impartial jury. *The lesson that I learned was that I had ignored some significant factors in that juror's background*, one that I would have ignored was that juror was of any racial background." (Emphasis added.) He later elaborated: "[T]he lesson that I've learned is that you can't be blind to other things that they're *telling you*."[14] (Emphasis added.)

In the instant situation, according to the prosecutor, Juror X's demeanor while responding to the prosecutor's questions, in contrast to her manner of response to defense counsel's questions, suggested to the prosecutor that she was not being totally forthcoming with him. The court validated his perception and commented upon the difference in her demeanor when responding to the respective attorneys. When the prosecutor attempted to question Juror X regarding her experience as a witness several years earlier in a murder case, she could not recall which side called her as a witness nor how many years earlier this had occurred. First she estimated it occurred more than five, than more than ten years prior.[15]

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[14] What follows is an incomplete, somewhat inexplicable sentence.

[15] Although both the prosecutor and the court found it remarkable that she would not recall clearly such an event, it may be that in some communities being a witness in a murder trial is not an event that is so extraordinary. There is no suggestion in the record as to what type of testimony Juror X provided in the murder case – eyewitness, alibi, authentication of business or hospital records for admission in evidence, etc, and no one asked. In other words, it may or may not have been testimony one would have been expected to readily recall a decade later on very short notice. The jurors in Williams's trial were presented with the written questionnaire in the courtroom the day trial commenced. There was not a lot of time for reflection.

However, what is not readily apparent from a simple reading of the record is Juror X's apparent reaction to the prosecutor's reasonable attempt to probe her memory of this event. She looked away from the prosecutor, paused for a long time before answering, and finally stated she could not recall whether she had been called by the defense or prosecution. Again, this is not in and of itself remarkable. The record suggests Juror X might have been in her sixties and taking medication that sometimes made her drowsy. What is significant is the prosecutor *and the court* observed that on this subject her conduct was evasive. The purpose of peremptory challenges is to allow a party to exclude prospective jurors who the party believes may be consciously or unconsciously biased against him or her. (*People* v. *Wheeler*, *supra*, 22 Cal.3d at p. 275.) The prosecutor chose to avail himself of this right.

Also of consequence to the prosecutor was the fact that Juror X did have some "clear" recollections of the prior Trilogy trials (including, perhaps, the mistrial), and a reasonable inference from one of her remarks was that she knew one or more of those defendants had been convicted.[16] Finally, the prosecutor expressed concern over the fact that Juror X had a son the same age as Dennis Stowe – the son of his "critical" prosecution witness and former defendant, Alice Stowe. Alice Stowe was set to testify (reluctantly) under a grant of immunity; the prosecutor characterized her as being in "virtually the same

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[16] The prosecutor asked if she recalled some of the facts she had heard about this case and she replied: "Well, I didn't know if it was fact or not. You know, how it just comes cross the screen, you don't know if that's fact, *you don't know which one is actually guilty. If you have a lot of people involved you don't know until trial.*" (Emphasis added.)

situation as [Juror X]." The prosecutor feared the number of similarities shared by the woman – to wit, gender, approximate age, race, family profile – might generate sympathy on the part of Juror X for Alice Stowe. He wanted to select a jury that would weigh Alice Stowe's credibility fairly; implicit in his remarks is the lingering reservation that Juror X, who shared many similarities with Alice Stowe, might have difficulty in that regard.[17] While this may be the weakest of the reasons cited, it was case-specific and tied Juror X to the issue. The Supreme Court has said that what is required are reasonably specific and neutral explanations that are related to the particular case being tried. That one person might regard a particular reason as trivial is not significant. (*People* v. *Johnson*, *supra*, 47 Cal.3d at p. 1218.)

The highest courts of both the state and federal systems have declared their confidence in the good judgment of trial judges to assess the sufficiency of the prosecutor's explanation. Thus, the trial courts are trusted "to distinguish bona fide reasons for such peremptories from sham excuses belatedly contrived to avoid admitting acts of group discrimination." (*People* v. *Wheeler*, *supra*, 22 Cal.3d at p. 282; *Batson* v. *Kentucky*, *supra*, 476 U.S. at p. 98, fn. 21; *People* v. *Fuentes* (1991) 54 Cal.3d 707, 714.)[18]

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[17] During the *Wheeler* motion, defense counsel seemed to suggest it was simply the racial identification shared by the two women that the prosecutor believed would lead to a hung jury. However, a full reading of the prosecutor's remarks belies this conclusion.

[18] The trial judge in this case had more than 10 years of judicial experience in supervising jury trials when this case was tried. Moreover, reviewing courts have long recognized that trial judges know the local prosecutors assigned to their courts and are in a better position than appellate courts to evaluate the credibility and the genuineness of

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If the trial court determines the justification offered by the prosecutor is adequate, it is not necessary for the court to make additional inquiry. (*People* v. *Cummings* (1993) 4 Cal.4th 1233, 1282.) What is apparent from the content of the court's inquiry here is that the court scrutinized carefully the prosecutor's reasons in order to determine whether they were pretextual. It explicitly determined they were not. The court expressly agreed with the prosecutor's assertion that Juror X was evasive when questioned by the prosecutor on the subject of her prior appearance as a witness in a murder case.

In reviewing the trial court's ruling on the *Wheeler* motion, we employ the substantial evidence test (*People* v. *Jackson*, *supra*, 10 Cal.App.4th at p. 21) while making an independent determination of the "'trial court's conclusion on whether the prosecutor stated adequate neutral reasons for the peremptory [challenge] in question[.]" (*People* v. *Alvarez* (1996) 14 Cal.4th 155, 198, fn. 9, citing *U.S.* v. *Bishop* (9th Cir. 1992) 959 F.2d 820, 821, fn. 1.)

The prosecutor offered adequate justification, in the form of facially race-neutral reasons unrelated to group bias, for the exercise of the peremptory challenge to Juror X. (*People* v. *Sandoval* (1993) 4 Cal.4th 155, 174-175.) He gave reasons that tied Juror X to the facts of the case; the reasons were not mere proxies for group bias. In addition, it is worth noting that it does not appear the prosecutor had a "previous plan" to challenge Juror X. He *did* question her, and not in an indifferent manner, in an attempt

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reasons given for peremptory challenges. (*People* v. *Johnson*, *supra*, 47 Cal.3d at p. 1219, fn. 6.; *People* v. *Buckley* (1997) 53 Cal.App.4th 658, 664-665.)

to expand on her answer in the questionnaire and to assess the extent of her knowledge of the ongoing District Trilogy prosecutions. (See *People* v. *Motton* (1985) 39 Cal.3d 596, 607, fn. 3.) Juror X was not the only juror the prosecutor challenged peremptorily.

Appellant also argues the trial court erred when it failed to determine whether race-neutral explanations actually prompted the prosecutor's peremptory challenge. (*People* v. *Fuentes*, *supra*, 54 Cal.3d at pp. 720-721.) Citing the court's remark set out here in the margin,[19] appellant argues the court failed to inquire into and determine whether the "non-racial explanations" actually "prompted" the prosecutor's exercise of the peremptory challenge of Juror X.[20] First, *Fuentes* is distinguishable. There the prosecutor challenged 14 prospective African-American jurors. Addressing the challenged jurors as a group, the trial court determined which of the "myriad justifications" cited by the prosecutor were sham and which were bona fide. However, with just one exception, "the court did not identify any particular juror or indicate which of the

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[19] "I do not think, as I analyze it, that the one part of the rationale of the prosecutor is valid. I do not think that because I do not think that it can be fairly said that [Juror X] came in here and wanted to serve someplace so that she could return a verdict in favor of Mr. Williams because she shared the same ethnic background or race. In fact, my rationale for that finding is that on the two previous cases where convictions were had, one, the foreperson was black and the other there was one black juror out of the 12.

"So with all due respect, I do not believe it to be valid that one can say that in a case such as this, one will not keep a black person because that person is going to not follow the law."

[20] Respondent has chosen not to reply to this portion of appellant's argument, which we assume is why appellant came back with 13 pages on this point in his reply brief.

purportedly 'good reasons' applied to which jurors." (*Id.* at pp. 711-713.) The court did determine which reasons were spurious and which were legitimate, but did not take the next, necessary step of asking whether the asserted reasons "actually applied to the particular jurors whom the prosecutor challenged." (*Id.* at pp. 713, 720-721.) Here the trial court was dealing with the challenge to only one African-American juror and the legitimate reasons given were, by definition, juror-specific; this was not an "abstract" evaluation of the prosecutor's reasons, as conducted in *Fuentes*. (*People* v. *Fuentes*, *supra*, 54 Cal.3d at p. 718.)

People v. *Tapia* (1994) 25 Cal.App.4th 984, is also distinguishable. There the trial court did consider the three challenged jurors on an individual basis, but like the trial court in *Fuentes*, it failed to undertake a "'reasoned attempt'" to evaluate the prosecutor's explanations. The *Tapia* trial court "never considered the genuineness of the prosecutor's reasons, just finding there was objective 'good cause' for the challenges. In the cases of Mr. Campos and Mrs. Raping, the court did not even analyze the reasons given by the prosecutor, but instead found its own reasons to support the challenge of Mr. Campos and undertook no analysis at all as to the challenge of Mrs. Raping." (*Id.* at pp. 1006, 1018.) To the contrary, here the trial court questioned the prosecutor, analyzed the explanations given and found several of the reasons "entirely legitimate." Unlike the situation in *People* v. *Turner* (1986) 42 Cal.3d 711, 727, the trial court here did not accept the prosecutor's reasons, which were termed inadequate, "at face value." The court here questioned, then carefully evaluated the prosecutor's explanations for the challenges in light of all the evidence before it.

Finally, the trial court's remark, cited earlier in the margin at footnote 19 *ante*, is a mischaracterization of the prosecutor's remarks about jury nullification.[21] Under a fair reading of the record, no reasonable person could argue that Juror X came to court that day knowing she would be seated in the jury box at the Williams trial, and thus put in a position to trigger a mistrial. Nor did the prosecutor's questionable ruminations on legal philosophy suggest that Juror X's mission that day was jury nullification.[22] A fair reading of his remarks is that his frustration over what he had been led to believe occurred at Williams's first trial[23] had now made him wary of his prior practice of seating at least one same-race-as-the-defendant juror on the jury panel, even when he had substantial, non-race related reservations about that juror.

The trial court may not have specifically expressed the notion that race neutral explanations actually prompted the prosecutor's challenge, but it made clear in its two statements addressing the motion that the non-race based

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[21] Obviously, the trial court heard the prosecutor's explanation once, in the midst of selecting a jury. An appellate court has the advantage of additional time to examine carefully the many participants' statements *in context*.

[22] "But I think the lesson that I've learned is that you can't be blind to the other things that they're telling you. If you've got a juror up there telling you, for whatever reason, there's not, you have to be blind as to race. You can't assume that, well, okay, because they happen to be of the same ethnic persuasion of the defendant, I'm going to allow them to be on the jury. We can't be blind in our society. There are people whose sole purpose is to get on a jury just solely so they can nullify the verdict."

[23] As noted previously, there is some support for what the "angry jurors" allegedly told him in the record.

factors cited were legitimate and that Juror X was noticeably evasive and not totally forthcoming when questioned by the prosecution. The trial court made the required "sincere and reasoned" attempt to evaluate the prosecutor's justifications. (*People* v. *Hall*, *supra*, 35 Cal.3d 161, 167-168.) The trial court did not err in denying Williams's *Wheeler* motion.[24]

II

IS THERE SUFFICIENT EVIDENCE TO SUPPORT WILLIAMS'S CONVICTIONS ON THE CONSPIRACY AND GRAND THEFT CHARGES?

Williams's substantial evidence attack[25] centers on: (1) the circumstantial nature of the evidence supporting the judgment; (2) the critical role "unsubstantiated" overt act 1 – the so-called "false billing" finding cited by the jury in support of the two conspiracy charges – played in all three convictions; (3) the District's lack of adequate inventory control; and (4) the evidence in the record from which a jury could have concluded Williams had a stockpile of new and surplus registers and meters from sources other than McCrometer, plus equipment he acquired and repaired himself, that could have explained the difference in the number of registers sold to Courtesy by McCrometer (111) and the number of registers sold by Courtesy to the District (297) in the pertinent time period (1991-1993).

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[24] Defense counsel raised the *Wheeler* motion again in his motion for new trial heard at sentencing. The court denied the motion.

[25] The court denied Williams's section 1118 motion at the conclusion of the prosecution case and denied his motion for new trial on grounds of insufficient evidence.

Counsel for Williams sets out 37 pages of facts in the opening brief in support of this and the remaining two issues raised by Williams. It is in equal parts argumentative and dismissive of the prosecution evidence; it emphasizes defense evidence and occasionally reduces trenchant prosecution evidence, impliedly relied upon by the jury in reaching its verdict, to a footnote, e.g., footnote 17 on page 26. Under this approach, it is not readily evident what evidence the jury likely relied upon to reach its verdict. Our recapitulation of the relevant facts, which we will incorporate into our discussion of the

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The express objection by defense counsel and his tactical reasons are on the record. The issue is waived.

DISPOSITION

The judgment is affirmed.

/s/ Dibiaso
Dibiaso, Acting P.J.

WE CONCUR:

/s/ Thaxter
Thaxter, J.

/s/ Buckley
Buckley, J.